	1909–10	1910–11	1911–12	1912–13	1913–14	1914–15
Res. Grad. . .	—	2	3	6	4	5
Third year . .	187	178	219	176	169	167
Second year . .	191	238	217	186	197	197
First year . . .	311	296	289	287	260	288
Unclassified . .	—	82	76	84	64	68
Specials . . .	70	3	4	5	1	5
	759	799	808	744	695	730

	1915–16	1916–17	1917–18	1918–19	*1919–19	1919–20
Res. Grad. . .	8	10	5	3	—	8
Third year . .	177	213	73	37	67	154
Second year . .	226	234	87	24	66	219
First year . . .	308	335	96	36	153	437
Unclassified . .	66	64	31	13	21	55
Specials . . .	1	2	0	1	—	1
	786	858	292	114	307	874

* These figures are for the special session which began on February 3, 1919, and ended on August 30, 1919.

In the present first-year class one hundred and twenty-one colleges and universities are represented, as follows:

Harvard, 85; Princeton, 33; Yale, 32; Brown, 17; Dartmouth, 12; Univ. of North Carolina, Williams Coll., 10; Univ. of California, 9; Holy Cross Coll., 7; Cornell, Univ. of Georgia, Leland Stanford Jr., Univ. of Pennsylvania, Washington and Lee Coll., Univ. of Wisconsin, 6; Bowdoin, DePauw Univ., Lafayette Coll., 5; Amherst, Colby, Georgetown Coll. (Ky.), Johns Hopkins, Ohio State, Univ. of Texas, 4; Univ. of Arkansas, Beloit, Boston Coll., Univ. of Chicago, Clark, Columbia, Univ. of Illinois, Univ. of Michigan, Univ. of Virginia, 3; Assumption Coll., Boston Univ., Bucknell, Carleton, Colgate, Fordham, Grinnell, Iowa State Teachers' Coll., Univ. of Iowa, Knox, Lincoln, Univ. of Maine, Univ. of Minnesota, Univ. of Missouri, Univ. of Nevada, Oberlin, Ohio Wesleyan, Univ. of Oklahoma, Univ. of Oregon, Univ. of Paris, Pennsylvania State, Univ., of Pittsburgh, Syracuse, Trinity Coll. (Conn.), Trinity Coll. (N. C.), Tulane, Vanderbilt, Wesleyan (Conn.), West Virginia, 2; Acadia Univ., Alabama Polytechnic Institute, Univ. of Alabama, Butler Coll., Catholic Univ. of America, Centre Coll. (Ky.), Univ. of Cincinnati, City Coll. (N. Y.), Univ. of Colorado, Cornell Coll. (Iowa), Culver-Stockton, Dalhousie, Delaware, Univ. of Denver, Emory Coll., Fairmount, Georgetown Univ., Haverford, Howard, Indiana, Iowa State Coll., Univ. of Kansas, Laval, Lehigh, Macalester, McMaster, Manhattan, Miami, Middlebury, Univ. of Mississippi, Mississippi Coll., Mount St. Mary's, Mount Union, Univ. of Nebraska, Univ. of North Dakota, Univ. of Notre Dame, Otterbein, Pomona, Purdue, Queens, Reed, Richmond, St. Anselm's, St. John's (Md.), St. John's (Ohio), St. Viateur's, San Juan de Latran, Univ. of South Carolina, Tufts, Union, Univ. of Utah, Washington Univ., Univ. of Washington, Washington and Jefferson, West Point, West Virginia, Wesleyan Univ., William and Mary, William and Vashti, Wittenberg, 1.

JURISTIC THEORY AND CONSTITUTIONAL LAW — LIABILITY WITHOUT FAULT. — All that need be said as to the theory and constitutionality of the Arizona Workmen's Compensation Acts, involved in *Arizona Copper*

Company v. *Hammer*,[1] was said some years ago by Professor Wambaugh.[2] Written just after the decision in *Ives* v. *South Buffalo R. Company*,[3] Professor Wambaugh's views have been amply borne out by the subsequent course of decision. But the dissenting opinions deserve notice from another standpoint.

"Talk of stubborn facts," says Dr. Crothers; "they are but babes beside a stubborn theory." That liability for tort can flow only from culpable conduct is simply a nineteenth-century juristic theory. Its most ardent advocates had to admit many "exceptions," which they explained historically as holdovers from an older idea that he who caused harm must absolutely answer for it. These "exceptions," which are now proving to contain a great deal of living and growing law,[4] were but recently pronounced gradually disappearing remnants of primitive law. Also the most conspicuous case of liability without fault, the case of the master's liability for the tort of his servant, was superficially reconciled with the theory of no liability without fault by a dogmatic fiction of representation whereby the fault could be made to appear that of the master.[5] Thus the nineteenth-century philosophy of law that put the free human will in the central place as that upon which everything must turn, gave us a dogmatic reduction of all liability to contract and tort — to liability to perform what one had freely undertaken and liability to answer for harm which he had culpably caused. By "implying" promises in cases of inequitable retention of benefits and in cases of duties annexed by law to relations and callings, by invoking the idea of representation, and by loose use of the term "negligence,"[6] it was possible to make this will-theory of liability cover the whole law. It is significant of our modes of legal thought that just at the time when this theory has definitely broken down, four judges of our highest court should be thinking of it as something so fundamental in law that no legislature may reasonably infringe upon it. Truly taught law is tough law.[7]

In another respect the dissenting opinions illustrate the importance of juristic theory. "There is," says Mr. Justice McKenna, "menace in the present judgment to all rights, subjecting them unreservedly to conceptions of public policy." No better example could be vouched for Austin's remark that until by careful analysis we have accurately determined the meaning of such terms as "right" and "public policy," "subsequent speculations will be a tissue of uncertain talk."[8] If legal rights are definitely established by a constitutional provision, assuredly

[1] U. S. Sup. Ct. No. 20, October Term, 1919. For a statement U. S. Sup. Ct., June 9, 1919 (October Term), see RECENT CASES, p. 116.

[2] "Workmen's Compensation Acts: Their Theory and Their Constitutionality," 25 HARV. L. REV. 129 (1911).

[3] 201 N. Y. 271, 94 N. E. 431 (1911).

[4] See note on Theyer *v.* Purnell, [1918] 2 K. B. 333, in 32 HARV. L. REV. 420.

[5] See BATY, VICARIOUS LIABILITY, 7.

[6] *E. g.*, in Noyes *v.* Colby, 30 N. H. 143, where an owner of a cow was held liable for trespass upon land due to its being turned out of the pasture by a third person without his knowledge or consent, the court quotes from Blackstone: "for if by his negligent keeping they stray upon the land of another . . . the owner must answer in damages." Here the result is called negligence, to make it appear that the result flows from culpability.

[7] ENGLISH LAW AND THE RENAISSANCE, 25.

[8] 2 JURISPRUDENCE, 4 ed., 1110.

they ought not to be suffered to be infringed on mere considerations of expediency. But it is only the ambiguity of the terms "right" and "public policy" that makes it possible to think of the acts in question in this way. The Fourteenth Amendment does not establish any defined legal rights. Rather it imposes a standard upon legislation — that it shall not be arbitrary and that it shall have a basis in reason. The "rights" of which Mr. Justice McKenna is speaking are not legal rights, but are individual interests which we feel ought to be secured by law, through legal rights or otherwise. Likewise the "public policy" of which he speaks is a mode of referring to social interests which the law ought to or does secure in delimiting individual interests and establishing legal rights. Often in a conflict of individual interests the law turns to "public policy" in this sense to determine the limits of a proper compromise. When the common law in a conflict between the individual interest of the landowner and that of the traveler on the impassable highway resorted to a "policy" expressing a social interest and established a "right of deviation," when in a conflict between the individual interest of the person defamed in his reputation and that of the defamer in speaking freely it resorted to another policy expressing another social interest and established privileged occasions, when as between the individual interest of the owner of land to enjoy it uninjured and that of the owner of a cow which has been let out of the pasture by a wrongdoer without his knowledge or consent,[9] it imposed a liability without fault to maintain the social interest in the general security — in all such cases the common law "subjects rights" to "public policy" exactly as the statutes do of which the minority of the court complain. Our legal terminology has blinded us to these compromises, which make up the whole body of the common law. The same terminology leads us to think of like compromises taking account of new interests, when made by the legislature, as startling and revolutionary.

MUST WE RECOGNIZE A NEW PRIVILEGE IN THE LAW OF EVIDENCE? — It is axiomatic in our law that the public has a right to every man's evidence.[1] To this principle the law of privileged communications forms an important exception. There is to-day no privilege for confidential communications, merely as such.[2] But communications made in the course of a few specific relationships have been recognized as privileged from disclosure. In each the law accords the privilege purely on grounds of policy, because it considers that greater social mischief would probably result from requiring the disclosure of such communications than from

[9] Noyes *v.* Colby, *supra*.

[1] See 4 WIGMORE ON EVIDENCE, quoting Lord Hardwicke, § 2192.

[2] Dean Wigmore tells us that in early English trials the obligation of honor among gentlemen, in regard to matters revealed to them in confidence, seems to have been recognized as an excuse for maintaining silence. See 4 WIGMORE ON EVIDENCE, § 2286. But a sterner view of the necessities of justice prevailed. "It is not befitting the dignity of this High Court," wrote Lord Campden in 1776, "to be debating the etiquette of honor at the same time when we are trying lives and liberties." Duchess of Kingston's Case, 20 How. St. Tr. 586. See also 1 GREENLEAF ON EVIDENCE, 16 ed., § 248.